123

(1)

Supreme Court, U.S.
FILED

No. 08-1187 MAR 20 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALLAN STEVO,

Petitioner,

v.

JOHN R. KEITH, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Independent candidates for elected offices have a First Amendment right to ballot access. Under the First Amendment, "severe" burdens on ballot access are subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "'[R]easonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," are generally valid if supported by "'the State's important regulatory interests.'" *Id.* (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). Discriminatory restrictions on ballot access, meanwhile, are subject to strict scrutiny under the Equal Protection Clause. *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Norman v. Reed*, 502 U.S. 279 (1992).

1. Whether Illinois's requirement that independent congressional candidates in the Tenth District sometimes collect signatures from 5,000 voters and other times collect over 10,000 signatures from voters in order to access the electoral ballot violates the Equal Protection Clause.

2. Whether the Seventh Circuit correctly concluded that Illinois's disparate treatment of similarly situated candidates and elections passes rational basis review.

3. Whether the Equal Protection Clause, as interpreted and applied in cases like *Illinois State Board*

QUESTIONS PRESENTED – Continued

of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), requires that laws treating similarly situated candidates and elections differently be subjected to strict scrutiny.

LIST OF PARTIES

The name of the Petitioner is:

Allan Stevo.

The names of all Respondents are:

John Keith, William M. McGuffage, Robert J. Walters, Patrick A. Brady, Wanda L. Rednour, Jessie R. Smart, Albert Porter, and Bryan Schneider, in their official capacities as Board Members for the Illinois State Board of Elections.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. Lower Courts Are Split Over Whether Equal Protection Challenges Under *Socialist Workers Party* Require Strict Scrutiny	9
II. Illinois's Distinction is Not Rational Within the Meaning of *Socialist Workers Party*	20
CONCLUSION	22

APPENDIX

Stevo v. Keith, No. 08-3218 (7th Cir. 2008)	App. 1
Stevo v. Keith, No. 3162 (C.D. Ill. 2008)	App. 9
Stevo v. Keith, No. 08-3218 (7th Cir. 2009) (rehearing denied)	App. 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 12, 13, 14, 15, 18

Burdick v. Takushi, 504 U.S. 428 (1992) 11, 12, 13, 16

Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007), *affirmed*, 128 S. Ct. 1610 (2008) 8

Gallivan v. Walker, 54 P.3d 1069 (Utah 2002) 18, 19, 20

Gjersten v. Board of Election Commissioners for the City of Chicago, 794 F.2d 472 (7th Cir. 1986) 17

Goldman-Frankie v. Austin, 727 F.2d 603 (6th Cir. 1984) 17

Green Party of New York v. New York State Board of Elections, 389 F.3d 411 (2d Cir. 2004) 14, 15

Green Party of New York v. Weiner, 216 F. Supp. 2d 176 (S.D.N.Y. 2002) 20

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) ..... *passim*

Jenness v. Fortson, 403 U.S. 431 (1971) 6, 11

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 16

National Prohibition Party v. State, 752 P.2d 80 (Colo. 1988) 20

TABLE OF AUTHORITIES – Continued

Page

New Alliance Party of Alabama v. Hand, 933 F.2d 1568 (11th Cir. 1991) 17

Norman v. Reed, 502 U.S. 279 (1992) 11, 16

Rainbow Coalition of Oklahoma v. Oklahoma Board of Elections, 844 F.2d 740 (10th Cir. 1988) 16

Reform Party of Allegheny County v. Allegheny Department of Elections, 174 F.3d 305 (3d Cir. 1999) 15

Rockefeller v. Powers, 74 F.3d 1367 (2d Cir. 1995) 12, 13, 21

Rockefeller v. Powers, 78 F.3d 44 (2d Cir. 1996) 14

State ex rel. Coker-Garcia v. Blunt, 849 S.W.2d 81 (Mo. App. 1993) 19

Stevo v. Keith, 546 F.3d 405 (7th Cir. 2008) 1, 7, 8, 9

Storer v. Brown, 415 U.S. 724 (1974) 16

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 15

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1973gg(b)(1) 5

42 U.S.C. § 1983 4

STATE STATUTES

10 Ill. Comp. Stat. § 5/10-3 ..... 2, 3, 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007) 16

RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW § 18.32(e) (4th ed. 2008) 8

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1108 (2d ed. 1988) 19

PETITION FOR WRIT OF CERTIORARI

Petitioner, Allan Stevo, petitions the Court for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Seventh Circuit (entered October 1, 2008 with rehearing denied on January 8, 2009), affirming the District Court's denial of Petitioner's Motion for Preliminary Injunction and dismissing his Complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Cudahy, Posner and Flaum, JJ.) is reported at 546 F.3d 405 (7th Cir. 2008), and is included in the Appendix. App., *infra*, at 1. The final judgment of the United States District Court for the Central District of Ohio (Mills, J.) is not reported and is reproduced in the Appendix. App., *infra*, at 9. The order of the United States Court of Appeals denying rehearing and rehearing *en banc* is not reported and is reproduced in the Appendix. App., *infra*, at 20.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 1, 2008. Rehearing was denied on January 8,

2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I:

> Congress shall make no law . . . abridging the freedom of speech, ...

U.S. Const., amend. XIV, § 1:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

10 Ill. Comp. Stat. § 5/10-3:

> § 10-3. . . . Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political subdivision, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding regular election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . . For the first election following a

> redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district. . . .

STATEMENT OF THE CASE

Petitioner, Allan Stevo, was an independent candidate for Illinois's Tenth Congressional District during the 2008 election. In an effort to qualify for Illinois's ballot, Stevo collected over 7,000 voters' signatures and duly submitted them to Respondents, members of the Illinois State Board of Elections (hereinafter "the Board") on June 23, 2008. Because his submission contained fewer than 10,285 signatures,[1] however, the Board on July 21, 2008 rejected Stevo's application.

The Board's decision was based on 10 Ill. Comp. Stat. § 5/10-3, which requires that independent candidates for Congress in election years that do not immediately follow the federal census (*i.e.*, election years ending with a "4," "6," "8," or "0") submit signatures equal in number to 5% of the total number of persons who voted in the last general election within the congressional district. Applying this requirement

[1] Stevo's submission was challenged by a Republican voter. Had there been no challenge, Illinois would have allowed Stevo's name on the ballot with or without 10,285 signatures.

to the Tenth Congressional District, the Board ruled that Stevo had to submit 10,285 signatures to qualify.

Stevo filed suit under 42 U.S.C. § 1983 and the Fourteenth Amendment on July 28, 2008, less than one week from the date he was excluded. Stevo argued that § 5/10-3's signature requirement violated the Equal Protection Clause. Stevo's argument is premised on the fact that in election years that immediately follow the federal census (*i.e.*, election years ending with a "2"), Illinois only requires that independent candidates for Congress gather 5,000 signatures. Under *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), Illinois must explain why it sometimes requires only 5,000 signatures and other times requires more than twice as many. This explanation must satisfy strict scrutiny.

The District Court dismissed Stevo's complaint on August 27, 2008. *See* App., *infra*, at 9. Stevo lodged his appeal on August 28, 2008 and immediately moved for both preliminary relief and expedited review. The Court of Appeals on September 3, 2008, denied Stevo's motion for a preliminary injunction and granted his motion to advance the appeal. Oral argument was held on September 25, 2008. *See* App., *infra*, at 1. The Court of Appeals affirmed the District Court's judgment with a written opinion entered on October 1, 2008. *Id.* Stevo filed a timely motion for rehearing, which was denied on January 8, 2009. *See* App., *infra*, at 20.

REASONS FOR GRANTING THE WRIT

Illinois's odd exception for election years that end with a "2" was passed into law in 1973. Prior to 1973, Illinois required that all independent candidates in all congressional election years supply a number of signatures equal to 5% of the last vote cast for the office. Illinois's change was ostensibly designed to simplify calculating the necessary number of signatures. According to the Board, no one can know following an intervening census how many votes were cast in a newly created congressional district. Five thousand signatures seemed a close approximation – at least in 1973.

Since 1973, Illinois's population has grown by over one million. Because of the federal Motor-Voter law passed in 1993, *see* 42 U.S.C. § 1973gg(b)(1), a greater percentage of Americans are now registered to vote. Further, Illinois has lost five seats in the House of Representatives since 1970. Consequently, Illinois's congressional districts today include significantly more people and more voters than they did in 1973. Five thousand signatures no longer approximates 5% of the vote cast in the last congressional election in the Tenth District. Illinois's requiring only half of the signatures ordinarily required every fifth election cycle can no longer be satisfactorily explained.

This is not to say that requiring 5,000 signatures, or 10,000 signatures for that matter,[2] is necessarily unconstitutional. Instead, under *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), Stevo argues that no good reason supports requiring 10,000+ signatures some of the time when 5,000 signatures is obviously enough following the census. If 5,000 signatures is sufficient to achieve the state's ends, demanding 10,000 is constitutionally inexplicable under *Socialist Workers Party*.

Of course, Illinois could argue that 5,000 signatures proves insufficient to manage its ballots. However, Richard Winger, the editor of *Ballot Access News*, testified in the District Court below that in 1982, 1992, and 2002 – the only years when Illinois's 5,000-signature-requirement has been applied – not one independent candidate qualified for Illinois's 61

---

[2] Petitioner concedes that Illinois could require that all independent congressional candidates, regardless of the year, collect a number of signatures equal in number to 5% of the total votes cast in the last election. *See Jenness v. Fortson*, 403 U.S. 431 (1971) (sustaining Georgia's 5% requirement). Stevo notes, however, that the raw numbers generated by this formula are among the largest in the country. Only two states, North Carolina (which requires 4% of the total number of registered voters in the district) and Georgia (which requires 5% of the total number of registered voters in the district), demand more signatures in federal House elections.

congressional elections.[3] Requiring 5,000 signatures is obviously a significant deterrent in Illinois.

Given these facts, Illinois was forced to argue before the Court of Appeals that, hypothetically, it might be too difficult following a census to accurately construct approximate votes in newly created congressional districts. Moreover, again without any factual support, the Board claimed that even if it could identify votes precinct-by-precinct, a "new" district *might* have different voting dynamics that *could* suppress or encourage voter turnout, thus rendering projected precinct counts unreliable. The best that the state could do, it claimed, was supply a fixed number – 5,000 – to proxy for 5% of the vote.

The Court of Appeals recognized that Illinois's claim was factually incredible. "[V]ote totals," it observed, "are reported for each precinct, and if a district's boundaries are changed, the votes cast in the previous election in the precincts within the new boundaries can be added up. . . . Indiana does that. . . ." *Stevo v. Keith,* 546 F.3d 405, 408 (7th Cir. 2008); App., *infra*, at 5. "The method that Illinois uses to reduce the required number of signatures is crude," the Court of Appeals concluded. *Id.*; App., *infra,* at 6.

---

[3] Winger also testified that of the 435 Districts in the United States, "[t]here are 55, including some in Illinois, in which the requirement is at or above 10,000 signatures." Winger further reported that the "median number of signatures required for an independent candidate is 2,750 signatures."

Still, notwithstanding these conclusions, the Court of Appeals sustained Illinois's law. In doing so, it applied a very deferential standard of review. The Court of Appeals did not even cite *Socialist Workers Party*, 440 U.S. 173, let alone apply the heightened scrutiny it requires. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW § 18.32(e) (4th ed. 2008) ("In *Illinois State Board of Elections v. Socialist Workers Party*, the Supreme Court unanimously . . . found the classification subject to the compelling interest test. . . ."). Responding to Illinois's unsubstantiated claim that it reduced the number of signatures in years following the census because "[c]andidates and voters alike must adjust to the new political landscape," the Court of Appeals merely commented that "[i]t is plausible that it would be more difficult for candidates to obtain signatures in such circumstances, and so the required number is reduced." 546 F.3d at 408; App., *infra*, at 6.

Rather than apply the strict scrutiny mandated by *Socialist Workers Party* and place the burden on the state to justify its disparate treatment, the Court of Appeals placed the burden on Stevo to propose "a *uniform* rule [that] . . . is so far superior to the present system that the Constitution requires that it be substituted for it." *Id.* at 409; App., *infra,* at 7-8. Because Stevo could not propose a constitutionally superior, uniform rule, it held for the state: "We warned in *Crawford v. Marion County Election Board,* 472 F.3d 949, 954 (7th Cir. 2007), affirmed, ___ U.S. ___, 128 S. Ct. 1610 (2008), against federal

judicial micromanagement of state regulation of elections." 546 F.3d at 409; App., *infra,* at 8 (citations omitted). Notwithstanding that Illinois's approach was arbitrary and crude, the Court of Appeals sustained it because "the change the plaintiff asks us to make in the Illinois voting system might well make that system more arbitrary than it already is." *Id.*; App., *infra,* at 8.

The Court of Appeals erred on two levels. Its first and most basic mistake was ignoring *Socialist Workers Party*, 440 U.S. 173, and applying a rational basis standard of review. Its second mistake was concluding that Illinois's approach satisfied this simple standard. Given its conclusion that Illinois's approach was "crude," "arbitrary," and factually inexplicable, the Court of Appeals should have invalidated it under any level of scrutiny.

I. Lower Courts Are Split Over Whether Equal Protection Challenges Under *Socialist Workers Party* Require Strict Scrutiny.

Lower courts are currently split over the continuing vitality of *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). In *Socialist Workers Party,* this Court held that the Equal Protection Clause limits the power of states to place disparate signature-collection demands on similarly situated candidates and offices. Specifically, the Court in *Socialist Workers Party* invalidated an

Illinois law that required candidates for local offices in Chicago to gather more signatures than candidates for state-wide offices. Applying strict scrutiny, the Court ruled that the Equal Protection Clause requires that signature requirements prove necessary to a compelling state interest. Because Illinois's "signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives," *id.* at 186, the Court invalidated Illinois's law. "The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet [the state] has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.*

Illinois argued in *Socialist Workers Party* that its disparate treatment was due, in part, to historical accident. As Illinois's election laws evolved, its requirements for city-wide and state-wide offices came to differ. The Court rejected this argument out-of-hand: "[h]istorical accident, without more, cannot constitute a compelling state interest." *Id.* at 187.[4]

---

[4] Justice Stevens concurred, explaining that "legislation imposing a significant interference with access to the ballot must rest on a rational predicate. This legislative remnant is without any such support." *Id.* at 193-94 (Stevens, J., concurring). Then-Justice Rehnquist also concurred, stating that Illinois's "disparity between the state and city signature requirements does not make sense. . . ." *Id.* at 190 (Rehnquist, J., concurring).

This Court employed *Socialist Workers Party*'s comparative approach again in *Norman v. Reed*, 502 U.S. 279 (1992). *Norman* invalidated an Illinois requirement that more signatures be collected for certain offices in multidistrict subdivisions than for statewide offices. The Court in *Norman* observed that *Socialist Workers Party* stands for the proposition that states cannot require more signatures for one office than another – at least not when the offices are similarly situated.

Both *Socialist Workers Party* and *Norman* stand for the unremarkable Equal Protection proposition that even though a state may place a particular obstacle in the path of candidates, it cannot impose this demand on some candidates but not others. Where candidates, parties, offices and elections are alike, they have to be treated alike. When they are not, the state has to adequately explain why it treats them differently – that is, it has to pass strict scrutiny. This is true regardless of whether the particular obstacle is independently unconstitutional.

In the present situation, Stevo concedes that Illinois could uniformly require signatures equal in number to 5% of the vote cast in the last election. This requirement, when applied evenly and equally, is constitutionally sound under *Jenness v. Fortson*, 403 U.S. 431 (1971) (sustaining Georgia's 5% requirement). In the words of the Court's more modern First Amendment cases, it does not impose a severe burden that transgresses the First Amendment's balancing test. *See, e.g., Burdick v. Takushi*, 504 U.S.

428, 434 (1992); *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983).

However, as stated in *Burdick* and *Anderson*, discriminatory measures fall outside this prescribed balancing test. Under *Socialist Workers Party* and the Equal Protection Clause, the question is not whether a particular burden is severe. Rather, the question is whether the burden is applied equally. If not, it must pass strict scrutiny.

The Seventh Circuit joined a number of courts that have ignored *Socialist Workers Party* and the separate limits on ballot access laws prescribed by the Equal Protection Clause. These courts have either collapsed *Socialist Workers Party*'s Equal Protection analysis into the First Amendment analysis announced in *Anderson*, or (like the Seventh Circuit) they have concluded that the Equal Protection Clause simply requires rationality review.

The Second Circuit's approach in *Rockefeller v. Powers*, 74 F.3d 1367 (2d Cir. 1995), is illustrative. The plaintiffs in *Powers* argued that a "signature requirement – the lesser of a fixed number or a fixed percentage in each congressional district – violates the Equal Protection Clause by discriminating against voters from congressional districts having relatively few enrolled Republicans." *Id.* at 1371.

> The plaintiffs explain this by statistics. . . . Republican delegate candidates in the Third District need 1250 signatures to qualify for the ballot, a mere 0.79 percent of the district's

> enrolled Republicans. In contrast, Republicans are least numerous in the Eleventh District in Brooklyn, where only 11,814 Republicans are registered. Since five percent of this number, 591, is fewer than 1250, Republican delegate candidates in the Eleventh District need only 591 signatures to qualify for the ballot.

Id.

The District Court, "[a]pplying the strict scrutiny test from *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), . . . held that no compelling interest existed for the five percent or 1250 signature requirement." *Id.* at 1372. The Second Circuit reversed: "the district court was incorrect to conclude . . . that the broad language of *Socialist Workers Party* automatically requires strict scrutiny for ballot-access measures that result in any sort of disparate treatment." *Id.* at 1378. It concluded that in the absence of a "significant[ ] burden[ ] [on] their fundamental right to vote" or a "significant[ ] impair[ment] [of] their ability to express political preferences," "strict scrutiny is not required." *Id.* It noted that *Burdick v. Takushi,* 504 U.S. 428 (1992), and *Anderson v. Celebrezze,* 460 U.S. 780 (1983), required "severe" burdens for heightened scrutiny to apply. *Id.* at 1378 n.16. Because it could find no severe burden, it stated that "[w]e apply a rational basis analysis." *Id.* at 1382. In sum, it collapsed *Socialist Workers*

Party's Equal Protection analysis into this Court's First Amendment formula.[5]

Green Party of New York v. New York State Board of Elections, 389 F.3d 411 (2d Cir. 2004), which invalidated a New York law that made it more difficult for minor parties to organize, reiterates the Second Circuit's view that the Equal Protection Clause inquiry mandated by *Socialist Workers Party* folds into the First Amendment analysis prescribed by *Anderson*:

> As the alleged violations of the plaintiffs' First Amendment rights form the basis of both the First Amendment and Fourteenth Amendment claims, we are faced with a situation where the plaintiffs' First Amendment claims substantially overlap with their equal protection claims. Accordingly, the analyses of plaintiffs' claims under the two amendments also substantially overlap. With respect to both claims, we must first determine the character and severity of the alleged burdens. If we conclude that the burdens on plaintiffs' associational rights are severe, we must next analyze the state's purported interests to determine whether those interests are compelling and, if so, whether the alleged burdens are necessary

---

[5] The Second Circuit in a subsequent appeal affirmed the District Court's conclusion that New York's law violated the First Amendment. *See Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996).

> for the state to achieve its compelling interests.

Id. at 420. Without a "severe" burden, the Second Circuit held, strict scrutiny is not required by the Equal Protection Clause.

The Third Circuit has taken this same approach. In *Reform Party of Allegheny County v. Allegheny Department of Elections*, 174 F.3d 305 (3d Cir. 1999) (en banc), the Third Circuit replaced *Socialist Workers Party*'s Equal Protection analysis with the First Amendment standards found in *Anderson*. There, Pennsylvania law precluded cross-endorsements by minor parties for some, but not all, offices. The law thus discriminated in two ways: against minor parties (because major parties were not similarly limited) and against some offices (because not all offices were affected). Still, notwithstanding that the challenge was brought under the Equal Protection Clause, the Third Circuit looked to the First Amendment for the proper analysis: "we assume, and we believe we must, that the above stated burdens require the same level of scrutiny in an equal protection analysis that they do in an associational rights analysis. . . ." *Id.* at 314.[6]

---

[6] Applying the intermediate scrutiny applied in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Third Circuit concluded that Pennsylvania's discriminatory anti-fusion law was invalid. *Id.* at 318.

In *Rainbow Coalition of Oklahoma v. Oklahoma Board of Elections*, 844 F.2d 740 (10th Cir. 1988), the Tenth Circuit took this same tack. There, Oklahoma law required that minor political parties collect signatures from a number of voters equaling 5% of the vote cast in the last general election. Because the gubernatorial and presidential elections alternate every two years in Oklahoma, the court explained, "more signatures are needed to satisfy the five percent requirement in a gubernatorial year than in a presidential year." *Id.* at 742. The challengers argued that *Socialist Workers Party* required that strict scrutiny be applied. *Id.* The Tenth Circuit disagreed: "more recent Supreme Court cases have neither demanded a compelling state interest nor insisted that the state demonstrate it has achieved this end by the least restrictive means available." *Id.* at 743 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). "Accordingly, this [*Anderson*] balancing test governs our determination here." 844 F.2d at 743.[7]

---

[7] Some commentators have likewise concluded that *Socialist Workers Party* died with this Court's more recent First Amendment cases. Professor Elmendorf, for example, has opined that both *Norman* and *Socialist Workers Party* are "aberrations" "in considerable tension with *Storer* [*v. Brown*, 415 U.S. 724 (1974),] (where Marshall dissented), and untenable after *Munro*, *Burdick*, and *Clingman*." Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 362 (2007).

In contrast, several lower courts, including the Seventh Circuit in *Gjersten v. Board of Election Commissioners for the City of Chicago*, 794 F.2d 472 (7th Cir. 1986), have continued to follow *Socialist Workers Party*. *Gjersten*, which was handed down three years after *Anderson,* invalidated an Illinois law that required candidates for ward committee to collect signatures equal to 10% of the primary electors in the district. Because Illinois only required 5% of the primary electors for candidates running for township committee, the Seventh Circuit used the Equal Protection Clause and the logic of *Socialist Workers Party* to strike it down.

Along these same lines, the Eleventh Circuit in *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991), relied on *Socialist Workers Party* to invalidate an April filing deadline for minor parties seeking to qualify congressional candidates in Alabama.

> Although the Court finds that the burden imposed on minor parties is not insurmountable, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed. . . . [A] State must 'adopt the least drastic means to achieve [its] ends.'

Id. at 1576 (quoting *Socialist Workers Party*, 440 U.S. at 185).

The Sixth Circuit in *Goldman-Frankie v. Austin*, 727 F.2d 603, 605 (6th Cir. 1984), handed down the year after *Anderson*, similarly used *Socialist Workers*

Party to strike down a Michigan law that prevented independent candidates from running for office: "Pursuant to the fundamental rights strand of equal protection analysis, a State must prove that its limitation 'is necessary to serve a compelling interest.'" (Quoting *Socialist Workers Party,* 440 U.S. at 184). Because Michigan could offer no compelling reason for keeping independent candidates off the ballot, its restriction failed strict scrutiny.

More recently, the Utah Supreme Court in *Gallivan v. Walker*, 54 P.3d 1069, 1076 (Utah 2002), relied on *Socialist Workers Party* to invalidate a requirement that popular initiatives' sponsors "obtain signatures from registered voters in each of at least 20 of Utah's 29 counties equal to 10 percent of all the votes cast for governor during the last gubernatorial election" in order to have them placed on ballots. The court observed that "[t]he multi-county signature requirement discriminates against urban voters because it allows voters in rural counties to wield disproportionate power over the placement of initiatives on the ballot." *Id.* at 1092. Because of the law's discriminatory nature, the court found that *Anderson* did not apply and looked to Equal Protection precedents, including *Socialist Workers Party,* for answers. *Id.* It concluded that "the multi-county signature requirement 'must be narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Socialist Workers Party,* 440 U.S. at 185). Because the "justifications advanced in support of the multi-county signature requirement . . . are not 'narrowly drawn to advance a state interest of compelling

importance,'" *Id.* at 1097 (citation omitted), the court struck it down.[8]

The Missouri Court of Appeals in *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81 (Mo. App. 1993), also relied on *Socialist Workers Party* to invalidate a requirement that minor party candidates qualify both statewide and locally in order to access ballots. "Because state ballot restrictions endanger vital individual constitutional rights, 'a State must establish that its classification is necessary to serve a compelling interest.'" *Id.* at 85 (quoting *Socialist Workers Party,* 440 U.S. at 184). The court concluded that "[s]atisfying the larger and more burdensome statewide requirement should preclude additional local signature requirements on county offices." *Id.* at 86. The state law, it offered, "will not withstand equal protection scrutiny. . . ." *Id.*

Professor Tribe in 1988 observed the "[u]ncertainty over just how strict the level of scrutiny should be" in ballot access cases. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1108 (2d ed. 1988). Professor Tribe there noted that "[i]t is still too early to predict

---

[8] Justice Thorne, in dissent, complained that the majority's "reliance upon *Illinois State Bd. of Elections*, which adopts this absolutist approach, conflicts with the reasoning in *Burdick*." *Id.* at 1107 (Thorne, J., dissenting). "The approach, as outlined in *Burdick*, requires a balancing of competing interests rather than an immediate application of strict scrutiny. Therefore, the majority errs in failing to apply the standard set forth in *Burdick*." *Id.* at 1107 n.8 (Thorne, J., dissenting).

whether these cases [after *Socialist Workers Party*] portend a general retreat from the rigid, two-tiered standard of equal protection review, or whether election cases are for some reason sui generis." *Id.* at 1110. That same year, the Colorado Supreme Court in *National Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988) (en banc), complained that "[t]he Supreme Court . . . has only provided limited definitive guidance in determining the validity of restrictions on ballot access. Some cases suggest a strict standard of scrutiny, *see* . . . *Socialist Workers Party*, . . . while others employ a looser standard, *see Anderson*. . . ." In the twenty-plus years that have followed Professor Tribe's observation, a good deal of confusion still exists over *Socialist Workers Party*'s validity. *See, e.g., Green Party of New York v. Weiner*, 216 F. Supp. 2d 176, 188 (S.D.N.Y. 2002) ("neat distinctions between challenges grounded in constitutionally protected associational rights and those arising under the Equal Protection Clause are difficult to apply in practice.").

II. Illinois's Distinction is Not Rational Within the Meaning of *Socialist Workers Party*.

Two Justices in *Socialist Workers Party* concluded that Illinois's disparate treatment was not rational. Justice Stevens explained that "legislation imposing a significant interference with access to the ballot must rest on a rational predicate. This legislative remnant

is without any such support." *Id.* at 193-94 (Stevens, J., concurring). Then-Justice Rehnquist, concurred, stating that Illinois's "disparity between the state and city signature requirements does not make sense. . . ." *Id.* at 190 (Rehnquist, J., concurring). The Second Circuit noted in *Rockefeller v. Powers*, 74 F.3d 1367, 1377 n.15 (2d Cir. 1995), that "[a]lthough the Court [in *Socialist Workers Party*] applied the strict scrutiny test, it would appear that the law would not have survived a rational basis test either."

Assuming that the Seventh Circuit was correct in choosing rationality review, it still erred in concluding that Illinois's approach passes this test. The best explanation Illinois can offer for its unique approach is that an arbitrary figure is necessary following the census because it is impossible to know the number of actual voters in a newly-created district. But as the Seventh Circuit observed, this claim is incredible. Indiana, to use one example, uses precinct voting figures to reconstruct what the vote would have looked like in newly-constructed districts. No other state follows Illinois's approach.

Even assuming that an arbitrary figure is needed following the census, Illinois's chosen number bears no relationship to what the state claims is ordinarily necessary. Here, 5,000 signatures is not even one-half of what is generally required in the Tenth Congressional District. Illinois's distinction is an "historical accident," having been put in place in 1973 when the state had fewer citizens, more districts, and fewer registered voters. As made clear by this Court in

Socialist Workers Party, distinctions based on historical accidents cannot satisfy the Equal Protection Clause.

In the end, one has to recognize that one of the two figures used by Illinois, either 5,000 or 10,000, "does not make sense." *See Socialist Workers Party,* 440 U.S. at 190 (Rehnquist, J., concurring). Illinois either needs 10,000+ signatures to manage its ballot, or it needs 5,000. It cannot have it both ways. Given the fact that no independent candidates for Congress have ever qualified under Illinois's 5,000-signature-requirement, demanding 10,000+ signatures cannot be rationally explained. Because Illinois's disparate treatment lacks a "rational predicate," *see id.* at 193-94 (Stevens, J., concurring), it cannot survive scrutiny under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-3218

ALLAN J. STEVO,

Plaintiff-Appellant,

v.

JOHN R. KEITH, *et al.*, in their capacities as members of the Illinois State Board of Elections,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 08-3162 – **Richard Mills**, *Judge.*

Argued September 25, 2008 –
Decided October 1, 2008

Before CUDAHY, POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* The plaintiff wants to run as an independent candidate for the U.S. House of Representatives from Illinois's Tenth Congressional District, which encompasses parts of Lake and Cook

Counties. His petition to appear on the November 2008 general election ballot was challenged by a local resident because the plaintiff had failed to submit with his petition the requisite minimum number of signatures of persons qualified to vote in the election. That number is 5 percent of the number of people who voted in the district in the last congressional election. 10 ILCS 5/10-3. For the Tenth Congressional District, the minimum required number of valid signatures is 10,285, and the plaintiff claims that he had more than 7,200. The Illinois State Board of Elections ruled that he had only 6,978 valid signatures; in any event he does not claim that his "more than 7,200" reached 10,285.

The plaintiff claims that the 5 percent requirement denies equal protection of the laws and infringes First Amendment rights to stand for public office and to vote for the candidate of one's choice. *Jenness v. Fortson,* 403 U.S. 431, 434 (1971); *Bullock v. Carter,* 405 U.S. 134, 143 (1972); James A. Gardner, "Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns," 54 *Buff. L. Rev.* 1413, 1432 (2007). A candidate denied a place on the Illinois ballot can, it is true, conduct a write-in campaign. "State of Illinois Candidate's Guide 2008" 41 www.elections.il.gov/Downloads/Election Information/PDF/08CanGuide.pdf (visited Sept. 30, 2008). But that is an inferior alternative to having one's name on the ballot. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 830-31 (1995); *Lubin v. Panish,* 415 U.S. 709, 719 n. 5 (1974).

The district court dismissed the complaint for failure to state a claim. The appeal relies mainly on equal protection; the First Amendment claim is not developed.

All congressional districts must be redistricted after each decennial census. *Georgia v. Ashcroft,* 539 U.S. 461, 488 n. 2 (2003); Ill. Const. art. IV § 3; 10 ILCS 76/1-76/99; Adam Cox, "Partisan Fairness and Redistricting Politics," 79 *N.Y.U. L. Rev.* 751, 752-53 (2004). And for the first election after the decennial census Illinois requires independent candidates to obtain only 5,000 valid signatures from qualified voters, rather than the 5 percent required in the other elections. 10 ILCS 5/10-3; *Libertarian Party v. Rednour,* 108 F.3d 768, 771 (7th Cir. 1997). In one congressional district, the Fourth, 5,000 is more than 5 percent of the voters in the last (2006) congressional election (5 percent in that district is only 4,293), but in the others it is less and in the Tenth Congressional District, with its requirement of 10,285 signatures, 5,000 is less than half of 5 percent of the votes cast in the last election.

The average number of required signatures per district is 9,442. The Fourth, with only 4,293, is an outlier; the next lowest is the Fifth, with 7,713. The highest is the Nineteenth, with 12,205. (These figures are computed from "Signature Requirements and Forms – U.S. Representative in Congress," www.elections.state.il.us/Downloads/ElectionInformation/PDF/usrep.pdf (visited Sept. 30, 2008).) Although the Supreme Court's reapportionment jurisprudence requires that

congressional districts be of equal population, *Karcher v. Daggett,* 462 U.S. 725, 730-31 (1983); *Wesberry v. Sanders,* 376 U.S. 1, 17-18 (1964), the 5 percent rule produces different numbers in different districts without violating the Constitution because it is 5 percent of the number of persons who actually voted in a district, not 5 percent of the district's population.

The last decennial census was in 2000, and no Illinois congressional district was redistricted after the most recent congressional election, held in 2006. But the plaintiff argues that there is no difference between a newly redistricted district and a district that is unchanged since the last election, and therefore the state's judgment that 5,000 signatures is enough in a newly redistricted district proves that 5 percent is too stringent a requirement in *any* district in which the 5 percent formula yields a requirement of more than 5,000 signatures, such as the Tenth.

The Supreme Court has held that 5 percent is a permissible minimum signature requirement for placing third-party or independent candidates on the ballot, *Jenness v. Fortson, supra,* 403 U.S. at 439-41; *Nader v. Keith,* 385 F.3d 729, 733 (7th Cir. 2004), provided that there is not only a write-in alternative but also other means of getting one's candidacy before the electorate, such as finding sponsorship by a political organization, *Jenness v. Fortson, supra,* 403 U.S. at 438; *Hall v. Simcox,* 766 F.2d 1171, 1174 (7th Cir. 1985), and provided also that the state does not impose "suffocating restrictions" on ballot access.

Jenness v. Fortson, supra, 403 U.S. at 438. Illinois does not. See *Nader v. Keith, supra,* 385 F.3d at 734-35; 10 ILCS 5/10-6, 5/10-8 to 5/10-10. But the plaintiff argues that Illinois's disparate treatment of the two types of district shows that a 5 percent minimum is arbitrary, at least in Illinois. He is using the 5,000-signatures provision of the law just to show that if it is good enough in newly redistricted districts, it is good enough in all districts.

The state defends the disparity in treatment between the two types of district on the ground that it is impossible to calculate a percentage of the votes in the previous election in a redistricted district because by definition there was no previous election in that district – the district didn't exist. But vote totals are reported for each precinct, and, if a district's boundaries are changed, the votes cast in the previous election in the precincts within the new boundaries can be added up and the sum will be the total number of votes that were cast in that area in the last election. Indiana does that in determining, when a district is redistricted, the number of votes that was cast in the last election in the area embraced by the new district; that number is then multiplied by the required percentage of valid signatures to determine whether the candidate has the signatures of enough qualified voters to get on the ballot. See Indiana Code §§ 3-8-6-3(a), 12(b)(7), (c), (d).

But this suit fails even if Indiana's procedure for determining the previous turnout in the area enclosed by new district boundaries is entirely feasible

(as we'll assume, though district boundaries sometimes slice through precincts and the turnout in each slice could not be determined with precision or perhaps at all). Redistricting is a disorienting event for voters and candidates alike, since it changes the electorate, usually with an eye to improving the electoral prospects of the majority party in the legislature doing the redistricting. *Gaffney v. Cummings,* 412 U.S. 735, 753-54 (1973); *Shaw v. Reno,* 509 U.S. 630, 661 (1993) (White, J., dissenting); *La Porte County Republican Central Committee v. Board of Commissioners,* 43 F.3d 1126, 1130 (7th Cir. 1994). Candidates and voters alike must adjust to the new political landscape. It is plausible that it would be more difficult for candidates to obtain signatures in such circumstances, and so the required number is reduced.

The method that Illinois uses to reduce the required number is crude, however, because districts vary in the number of people who voted in the last election. Hence the anomaly of the district in which the requirement of 5,000 signatures is more demanding than the 5 percent requirement, making it more difficult for candidates to obtain the required number of signatures in election years in which the district has been redistricted even though the objective of requiring "only" 5,000 signatures in new districts is to make the process of qualifying for a place on the ballot less difficult (albeit it is more difficult in only that one district). But the plaintiff's proposal – a requirement in every election of just 5,000 signatures

– is as or more arbitrary, since, other things being equal, it is easier to obtain a specified number of signatures the larger the turnout in the district in the preceding election, and hence the smaller the percentage of qualified voters whom the candidate is required to sign up to reach the minimum number and so get onto the ballot. There are more fish in the pond, so it is easier to catch the required number.

Granted, other things may not be equal. The more signatures that are required, the greater the cost, and the difference may be important for a minor-party or independent candidate. *Hall v. Simcox, supra,* 766 F.2d at 1174. But at best this point makes the choice between number and percentage a stand-off; it does not justify invalidating the percentage approach.

Suppose the Indiana approach, whereby disaggregation of votes to the precinct level in the preceding election enables the same percentage to be required in districts that have recently been redistricted and districts that have not been, is indeed a compellingly superior approach; nevertheless the plaintiff would not have standing to urge its adoption. The Indiana approach is a solution to the problem of determining previous voter turnout after a redistricting, and the Tenth Congressional District is not a newly redistricted district. So the plaintiff is forced to argue that a *uniform* rule requiring 5,000 signatures (or a slightly higher number, provided it is below the number of valid signatures he was able to obtain) is so far superior to the present system that the Consti-

tution requires that it be substituted for it. That is wrong, given the disparity in voter turnout in the different districts. We have just seen that requiring a number rather than a percentage may well be a bad feature of Illinois's treatment of elections in recently redistricted districts; the plaintiff urges us to impose that quite possibly inferior method in all elections, rather than, as at present, in just the elections in newly redistricted districts.

We warned in *Crawford v. Marion County Election Board,* 472 F.3d 949, 954 (7th Cir. 2007), affirmed, 128 S. Ct. 1610 (2008), against federal judicial micromanagement of state regulation of elections. See also *Clingman v. Beaver,* 544 U.S. 581, 593 (2005); *Burdick v. Takushi,* 504 U.S. 428, 432-34 (1992); *Storer v. Brown,* 415 U.S. 724, 729-30 (1974). But the appeal in this case fails on a more basic level: the change the plaintiff asks us to make in the Illinois voting system might well make that system more arbitrary than it already is.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ALLAN STEVO, Plaintiff, vs. JOHN R. KEITH, WILLIAM M. McGUFFAGE, ROBERT J. WALTERS, PATRICK A. BRADY, WANDA L. REDNOUR, JESSIE R. SMART, ALBERT PORTER, and BRYAN SCHNEIDER, in their official capacities as Board Members for the Illinois State Board of Elections, Defendants.	No. 08-3162

OPINION

(Filed Aug. 27, 2008)

RICHARD MILLS, U.S. District Judge:

Plaintiff Allan Stevo is an independent candidate for Congress who seeks to be placed on the ballot for the Tenth Congressional District in Illinois. He filed suit after the Illinois State Board of Elections rejected his application as not containing enough signatures. Several motions are pending before the Court.

I. BACKGROUND

This is an action under 42 U.S.C. § 1983, wherein Plaintiff Allan Stevo alleges his rights under the First and Fourteenth Amendments have been violated. The complaint alleges that Stevo is an Illinois resident who lives outside of Chicago and satisfies the constitutional requirements for election to the United States House of Representatives. The Defendants are Board Members sitting on Illinois's State Board of Elections and are sued in their official capacities.

Stevo alleges that the application of certain provisions of the Illinois Election Code, *see* 10 ILCS 5/1-1, *et seq.*, violates his rights under the First and Fourteenth Amendments. Under Illinois law, in most election years, an independent candidate for congressional office must collect signatures equal in number to 5% of the total number of persons who cast votes in the last general election in the district. *See* 10 ILCS 5/10-3.

Stevo claims that on June 23, 2008, he submitted over 7200 valid voters' signatures in attempting to qualify for the Tenth Congressional District ballot. Several days later, Stevo's candidacy was challenged by Patrick LeBeau of DesPlaines, Illinois. Stevo alleges that on July 21, 2008, the Defendants concluded that he had not complied with the Illinois requirement that independent candidates for Congressional seats in election years that do not immediately follow the federal census submit signatures equal in number to 5% of the total number of persons

who voted in the last general election within the district. *See* 10 ILCS 5/10-3. The Defendants determined that in order to qualify for the ballot, a candidate was required to file a petition which contained no fewer than 10,285 signatures. They found his petition contained only 6,978 valid signatures.

Stevo notes that the Illinois statute states in part, "For the first election following a redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district." *See* 10 ILCS 5/10-3. Under that law, therefore, independent candidates who ran for Congress in 1972, 1982, 1992 or 2002, and independent candidates who run in 2012 (assuming the same law is then in place) are only required to gather signatures from 5,000 qualified voters in the congressional district in which they are running. Stevo contends that the 5% rule which in this case would require more than twice as many signatures than the 5,000 required immediately following a federal census is unnecessary, discriminatory and unconstitutional.

Stevo claims that the requirement of 10,285 signatures for the 2008 congressional ballot places a severe burden on the First Amendment rights of independent candidates. He contends, moreover, the requirement that only 5,000 signatures are necessary in election years immediately following the federal census proves that the more burdensome requirement is unnecessary, discriminatory and unconstitutional.

II. ANALYSIS

In arguing that the Plaintiffs' complaint should be dismissed, the Defendants rely in part on the decision in *Libertarian Party of Illinois v. Rednour,* 108 F.3d 768 (7th Cir. 1997), wherein the Seventh Circuit held that the state law requirement that a new political party meet the 5% petitioning requirement is constitutional.[1] *See id.* at 776-77. "The Supreme Court has long permitted states to impose various restrictions limiting a candidate's access to the ballot." *Id.* at 774. Thus, "states have a vital and compelling interest in requiring political parties appearing on the general ballot [to] demonstrate a significant, measurable quantum of community support." *Id.* (internal quotation marks and citation omitted). The purpose of allowing such restrictions is to further the state's legitimate interest of "avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* (quoting *Jenness v. Fortson,* 403 U.S. 431, 442 (1971)).

(A)

Stevo claims that *Rednour* is not relevant, in that Illinois cannot demand 10,000+ signatures from independent congressional candidates in the Tenth

---

[1] The Defendants also contend that the requested equitable relief is barred by the doctrine of laches, in that Stevo attempted to comply with the statutory provisions that he now asserts are unconstitutional.

District in 2008, yet only demand 5,000 signatures, under the same law and from the exact same candidates – in 2002 and 2012. According to Stevo, Illinois can demand 10,000+ signatures from all prospective candidates or 5,000 from all. Stevo claims, however, that the State simply cannot apply different standards to candidates running in 2008 than it has previously applied or will apply in the future.

Stevo's Equal Protection argument is based on the fact that his signature submission would have sufficed to qualify him for the congressional ballot in Illinois in years ending in "2," pursuant to the State's decennial redistricting exception. In contending that he is likely to succeed on the merits, Stevo notes that the 5% signature requirement for independent congressional candidates is one of the most severe in the country. While this may be true, the United States Supreme Court and the Seventh Circuit have concluded that similar or more restrictive requirements are constitutionally sound. *See Jenness v. Fortson,* 403 U.S. 431, 438 (1971) (determining a requirement that an independent candidate for elective public office submit signatures from 5% of registered voters does not violate the Constitution); *see also Rednour,* 108 F.3d at 776-77. Thus, Stevo concedes this requirement alone is not by itself unconstitutional.

When the 5% requirement is compared with the 5,000 signatures required immediately following a federal census, Stevo claims that the Illinois law cannot withstand heightened scrutiny. He contends

the requirement is not necessary to achieve any compelling, or even legitimate, state interest.

Stevo notes that in *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979), the Supreme Court addressed a requirement that required independents and new parties to submit 35,947 valid signatures in order to obtain ballot access in a special mayoral election in Chicago. *See id.* at 177-78. According to the Illinois Election Code, the signatures of 25,000 qualified voters were necessary in order to appear on the ballots in statewide elections. *See id.* at 175. In elections for offices of political subdivisions of the State, however, a candidate had to submit at least 5% of the number of persons who voted in the previous election. *See id.* at 175-76. The Court observed that in Chicago, "application of this standard has produced the incongruous result that a new party or independent candidate needs substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office." *Id.* at 176-77.

The Court concluded that "[t]he signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives." *Id.* at 186. The State advanced no reason why a more stringent requirement was needed for Chicago. *See id.* Although the anomaly at issue may be explained by the fact that the requirements were tied solely to a population standard, the Court concluded that this "cannot constitute a compelling

state interest," and any requirement that new parties and independent candidates submit more than 25,000 signatures is therefore unconstitutional. *See id.* at 187.

Stevo further notes that in *Norman v. Reed,* 502 U.S. 279 (1992), the Supreme Court observed that "Illinois law retains the constitutional flaw at issue in *Socialist Workers Party* by effectively increasing the signature requirement applicable to elections for at least some offices in subdivisions with separate districts." *Id.* at 293. The Supreme Court noted that under the State Supreme Court's interpretation of the applicable statute, the petitioners were required to submit 50,000 signatures (25,000 from the city district and another 25,000 from the suburbs) to run any candidates. *See id.* The Court concluded that the rule in *Socialist Workers Party* prevents the State from requiring the petitioners to accumulate twice as many signatures to field candidates in Cook County as they would need statewide. *See id.*

Stevo further notes that in *Gjersten v. Board of Election* Commissioners for City of Chicago, 791 F.2d 472 (7th Cir. 1986), the Seventh Circuit determined that, because the two offices were the same, the district court properly invalidated a law which required that candidates for ward committeeman collect signatures equal to 10% of the primary electors, when candidates for township committeeman had to submit only 5%. *See id.* at 476-77.

Stevo also points to a district court's decision in *Citizens Party of Illinois v. Illinois State Bd. of Elections,* 546 F. Supp. 1050 (N.D. Ill. 1982), which analyzed the requirement that candidates for the state senate and state house needed 3,000 signatures in elections following a redistricting. *See id.* at 1052.The court noted that because of the size of the districts, the party interested in running for the senate drew from an available pool of voters that was approximately twice as large. *See id.* at 1053. After observing that the defendants failed to provide a reason for this disparity, the court concluded that plaintiffs had established a likelihood of success on the merits. *See id.* at 1058.

Stevo attempts to draw an analogy between this case and *Citizens Party*. He alleges the requirement in that case was unconstitutional because it required twice as much of a house candidate as it did of a senate candidate. Stevo contends that the percentage requirement in this case should similarly be invalid because it requires that he collect twice as many signatures as a similarly situated candidate running in 2002 or 2012. He asserts this comparison proves that 10,000+ signatures cannot be the least restrictive alternative when 5,000 worked in 2002 and will work in 2012 to achieve the State's interests.[2] Like

---

[2] According to Stevo, Illinois is the only state that requires a flat number of signatures (for either an independent or minor party candidate for Congress) in some election years, and a

(Continued on following page)

the court in *Citizens Party,* Stevo claims this Court should correct the disparity by requiring him to submit a number of signatures that is equal to what is necessary – 5,000 signatures at most.

(B)

After considering the relevant Supreme Court and Seventh Circuit cases, the Court concludes that Stevo has failed to demonstrate a likelihood of success on the merits and is not entitled to injunctive relief. Stevo has not alleged an Equal Protection violation. Independent candidates for Congress are treated equally under 10 ILCS 5/10-3.

An example of an Equal Protection violation would be an Illinois law that required independent candidates to submit the signatures of 5% of a district's voters, while requiring less (or more) of that number for other independent candidates in order to appear on the ballot for the same office. Under the current Illinois law, independent candidates are treated equally each election cycle. Every ten years, Stevo or any other independent candidate who otherwise meets the qualifications for Congress can obtain ballot access by submitting the signatures of at least 5,000 qualified voters of a congressional district. In other congressional election years, independent candidates such as Stevo can have their names placed

---

number calculated as a percentage of voters in other elections years.

on the ballot by submitting the signatures of more than 5% of that district's voters.

Each of the Supreme Court and Seventh Circuit cases relied on by Stevo are distinguishable from this case. Significantly, none of those cases (*Socialist Workers Party*, *Norman*, or *Gjersten*) deal with differing standards for obtaining ballot access in different election cycles. In each of those cases, the Court is addressing different standards for being placed on the ballot for a particular office in a given year.[3] This is crucial as to why Equal Protection violations were found – independent candidates running for the same office or very similar offices were held to different standards for obtaining ballot access.

Stevo has pointed to no case which holds that it is an Equal Protection violation to have differing standards for being placed on the ballot in different election years. The law at issue in this case may "make no sense," as Stevo argues. It may be unwise. However, that does not mean it is unconstitutional.

III. CONCLUSION

The Court concludes that, because Stevo has failed to establish a likelihood of success on the merits, he is entitled to no injunctive relief. Moreover, because the United States Supreme Court and the United States Court of Appeals for the Seventh

---

[3] The same is true of the district court in *Citizens Party*.

Circuit have recognized that 5% signatory requirements are constitutional, the Court concludes that Stevo has failed to state a claim upon which relief can be granted.

Ergo, the Plaintiff's motion for a preliminary injunction [d/e 2] and his motion for a temporary restraining order [d/e 6] are DENIED. The Defendants' motion to dismiss [d/e 8] is GRANTED. All other motions are DENIED AS MOOT.

ENTER: August 27, 2008

FOR THE COURT:

/s/ Richard Mills
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 2009

Before

RICHARD D. CUDAHY, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

No. 08-3218

ALLAN J. STEVO,

Plaintiff-Appellant,

v.

JOHN R. KEITH, *et al.*, in their capacities as members of the Illinois State Board of Elections,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 08-3162

Richard Mills, *Judge.*

ORDER

(Filed Jan. 8, 2009)

On October 15, 2008, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.